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Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

JOHN A. MANDACINA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The first question presented is whether the Court of Appeals has impermissibly expanded the standard of what constitutes "evidence that a movant can discover through his own reasonable investigation" in violation of the defendant's Due Process rights as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963).

The second question presented is whether the Court of Appeals correctly ruled that the amended Brady and ineffective assistance claims in Petitioner's supplemental motion to vacate his conviction did not relate back to the original motion.

The third question presented is whether the Court of Appeals correctly ruled that the amended *Brady* and amended ineffective assistance claims in Petitioner's supplemental motion were not filed within one year of the date on which the facts supporting the claims could have been discovered through the exercise of due diligence under 28 U.S.C. §2255(4), or within one year of the date on which the impediment to making a motion created by Governmental action in violation of constitution or laws of the United States was removed.

The final question presented is whether the Court of Appeals correctly applied the actual innocence standard when it denied the movant a gateway to avoid procedural default without requiring the government's disclosure of the exculpatory evidence at issue or an evidentiary hearing after permitting counsel to review the undisclosed material and explore its potential fruits.

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Petition John A. Mandacina respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit which was entered in this case on May 16, 2003.

OPINIONS BELOW

The opinion of the United States District Court is reported at 2001 U.S. Dist. Lexis 10971 (W.D. Mo. 2001) and is included in the appendix attached hereto at page A-1. The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 328 F.3d 995 (8th Cir. 2003), and is included in the appendix attached hereto at page A-25. The Court of Appeals denied rehearing by the panel and rehearing en banc on July 22, 2003 and the denial is included in the appendix attached hereto at page A-39.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). On May 16, 2003 the United States Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court, *Mandacina v. United States*, 328 F.3d 995 (8th Cir. 2003). A timely petition for rehearing by the panel or, in the alternative, for rehearing en banc, was filed. That petition was denied on July 22, 2003.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be...deprived of life, liberty, or property, without due process of law...

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and the District wherein the crime shall have been committed;...and be confronted with the witnesses against him.

Title 28, United States Code, Section §2255 provides in pertinent part:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by Governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of the due diligence.

STATEMENT OF THE CASE

1. The government conducted an investigation of alleged illegal gambling activities. That investigation resulted in the indictment of Petitioner John Mandacina, and nine others, including the informant, Larry Strada.

2. It is the government's theory that Petitioner believed the informant was cooperating with the government in the gambling prosecution and that, in an act of retaliation, Petitioner participated in a conspiracy to murder the informant, and that Petitioner's role in the conspiracy was to offer money to Patrick McGuire to murder the informant. The informant was murdered on May 16, 1990.

3. On May 14, 1993, based upon information provided by two bank robbers seeking reductions in sentence, Petitioner and McGuire were indicted and charged with various offenses, including conspiracy to retaliate against a government witness. Petitioner was convicted and sentenced to life plus five years. The United States Court of Appeals for the Eighth Circuit affirmed Petitioner's convictions over the dissenting opinion of Judge Morris Sheppard Arnold, who opined that there was insufficient evidence to support the conviction of using interstate commerce in the commission of the retaliation. *United States v. McGuire*, 45 F.3d 1177, 1189 (8th Cir. 1995) (concurring and dissenting).

4. Prior to this murder, Petitioner had entered a plea of guilty and been sentenced to 12 months confinement in the gambling case.

5. The only evidence offered against Petitioner at trial was the testimony of two cooperating witnesses. These witnesses were two bank robbers named Earlywine and Dodds. They claimed that Petitioner hired their partner in the bank robberies, Patrick

McGuire, to kill the informant in retaliation for his alleged cooperation with the Government in the gambling investigation. Dodds and Earlywine received cash payments and substantial reductions in their sentences. In written and initialed statements, Dodds and Earlywine implicated four others as participating in the offer of money to McGuire. However, at trial, they testified that Petitioner alone offered McGuire money to kill Strada. Their trial testimony was inconsistent with each other and it directly contradicted their earlier statements. The Government also presented uncorroborated evidence from a third witness, Frank Angotti, who testified that McGuire admitted to killing Strada. (Tr. 1091).

6. Petitioner timely filed his original motion to vacate or set aside conviction and sentence pursuant to 28 U.S.C. §2255 on April 23, 1997. In that motion, Petitioner, among other things, requested evidence obtained by the Gladstone Police Department and detectives involved in the investigation of Strada's murder and evidence of his cooperation with the Government. Petitioner also argued that trial counsel was ineffective for failing to investigate these materials. The Government responded that certain information was turned over and that the remainder of the Gladstone Police Department (Metro Squad) files was not exculpatory. During that time, Petitioner's investigatory efforts continued, in part through the efforts of a private investigator.

7. In that process, Petitioner's counsel discovered the existence of undisclosed exculpatory evidence. This was accomplished by working backwards from an overheard confession by an individual who had every reason, ability and opportunity to murder Strada. The private investigator investigated an allegation by Kevin Cummings that an individual named Charles St. John

had confessed to killing Strada. The investigator was able to support a defense theory that others – known to the government – had a motive and opportunity to murder Strada. This exculpatory information should have been disclosed to Petitioner's trial counsel before trial.

8. The District Court entered a partial order on September 7, 2000 denying several claims and permitting Petitioner additional discovery regarding others. Petitioner filed a Motion to Set Aside or Reconsider the Court's Memorandum and Order and/or for Leave to File a Supplemental Motion on September 26, 2000. Petitioner filed therewith a Supplemental Motion to Vacate or Set Aside Conviction which included additional arguments formulated as a result of Petitioner's continuing investigation (the "Amended Claims") as summarized below.

9. On October 10, 2000, the Government responded arguing that the Supplemental Motion constituted a second or successive petition. The Court requested briefs as to whether the Amended Claims in the Supplemental Motion were time-barred under 28 U.S.C. §2255. On February 16, 2001, Petitioner filed his brief, which included numerous exhibits and affidavits presenting information discovered within one year of the filing of the Supplemental Motion. On July 25, 2001, the court denied Petitioner's Motion to Set Aside or Reconsider the Court's Memorandum and Order and/or for Leave to File a Supplemental Motion. The Amended Claims were stricken and the remainder of the claims in Petitioner's original motion were denied.[1] Petitioner timely filed a Motion to Alter or Amend Judgment on

[1] The court's opinion erroneously stated "It is notable that McGuire's guilt is no longer in question." Neither the government's nor petitioner's counsel knows of any basis for this statement.

August 8, 2001 which the Court denied on August 14, 2001. A Notice of Appeal was filed October 11, 2001. An Application for Certificate of Appealability was filed October 15, 2001.

10. Petitioner's Amended Claims included claims of alleged Brady violations and ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Three weeks before trial, the District Court, after an *in camera* review, forced the government to disclose a report of an interview of Strada's girlfriend, Donna Borland. Borland identified names on a police list as Strada's drug dealing associates who killed Strada for snitching.[2] The government never disclosed the list of suspects or other information provided to the authorities by Borland.

11. As important, the government never disclosed the evidence, interviews and reports leading to the preparation of the list of people the Metro Squad suspected were responsible for Strada's murder or the subsequent investigation corroborating Borland's claims. None of this information was included in the

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[2] Government counsel sent Mandacina's trial counsel a report of a May 19, 1990 interview with Donna Borland ("Borland Report"), by two Gladstone Missouri Police Detectives. According to the report, Borland told the detectives the victim was involved in "fronting money for others to buy drugs." Borland further told the detectives that the murder "was done because [the victim] had turned some information and names over to the authorities in reference to the buying and selling of drugs." Borland did not provide the detectives with specific names, but said, "they were some of the people...mentioned earlier" by the detectives. The detectives had previously read Borland a list of names collected in the investigation. Near the end of the interview, Borland told the detectives that "six or seven people [were] indicted and this was done within the past six months." Borland also told the detectives they needed "to identify and talk with these people, as this is probably where the 'hit' came from."

Borland Report or in the discovery provided to defense counsel. Investigation developed subsequent to Charles St. John's overheard confession established that this undisclosed list of suspects included Charles St. John and his brother Steven. Both of these individuals were identified by Borland and both were, in fact, indicted along with 5 others for drug dealing shortly after the informant's cooperation and proffer. The government did not disclose any reports of any investigations of the St. Johns or of the other individuals Borland identified during her interviews. Further, the government did not disclose the indictments of the St. Johns for drug dealing or that the drug indictments were pending at the time of the informant's murder. Nor did the government disclose that the St. Johns were known associates of the informant. The government also withheld the interviews of Steven St. John by the Metro Squad and the FBI and his grand jury testimony. The government never even disclosed that these reports and information existed. Steven St. John's grand jury testimony directly contradicted Frank Angotti's trial testimony as to Angotti's basis for eliciting McGuire's alleged admission. The government also failed to disclose that it granted immunity to Steven St. John to testify before the grand jury. The government failed to disclose Angotti was on probation when he testified, had been threatened by the government, and that Angotti had been granted assurances in return for his statements and testimony. To this day, none of this exculpatory evidence has been disclosed to the Petitioner, nor has Petitioner been given an evidentiary hearing to present this exculpatory evidence in a courtroom.

12. Petitioner's trial counsel did not investigate the Borland Report or Borland's accusations and failed to secure from the government the list of names Borland identified, and failed to obtain the supporting evidence

that led the police to suspect individuals other than Petitioner. Trial counsel failed to determine that some of the individuals Borland identified had been indicted for drug offenses in the months prior to the murder and were facing significant prison sentences at the time of Strada's murder.[3] Defense counsel failed to investigate and present evidence that these individuals were friends of Strada, were aware of his daily routines, knew he carried a gun, had the ability to approach Strada in his driveway without arousing alarm, and could have gained access to Strada's handgun and used it to murder him.

13. The only physical evidence available in this case corroborated a defense theory that one of the St. Johns murdered Strada. The autopsy indicated a contact wound on Strada's chest wherein the gun muzzle was pressed directly against him when it was fired. Only someone he knew could get this close without a struggle or without Strada running away, and McGuire did not know him.

14. The remaining four wounds were at a 45 degree upward angle as if Strada was in a prone position. No weapon was found but the shells at the scene matched the brand and caliber of the cartridges in the Strada home.

15. An interview of Charles St. John revealed information that could only be known by the murderer. Charles St. John stated that he believed Strada was a snitch, he knew Strada carried a gun and he stated that Strada set his handgun down prior to taking out the trash, just seconds before his murder. This last detail is not contained in any police report or newspaper article regarding the murder. No weapon was recovered at the

[3] Unlike Petitioner who had already pled and been sentenced to only 12 months for taking sports bets in his position as a bartender.

scene and Strada did not have his gun. Footprint casts made by detectives at the crime scene more closely matched Steven and Charles St. John than McGuire.

16. Viewed in its entirety, the evidence resulting from the post trial investigations was not available to trial counsel or the jury. This evidence would have produced a strong case against the St. Johns and would have substantially weakened the case against the Petitioner. The failure to properly investigate and develop this evidence for presentation at trial resulted from both trial counsel's ineffective assistance and the Brady violations by the government. The "defense" primarily consisted of the cross-examination of Dodds and Earlywine. Trial counsel, apparently in an attempt to make a "dramatic" point, chose not to cross-examine Angotti – whose testimony was purportedly limited to McGuire – despite the incredibly prejudicial nature of Angotti's uncorroborated testimony.

17. Frank Angotti testified that he learned from Steven St. John that Patrick McGuire had killed Larry Strada, and that was why he asked McGuire if he did it. A subsequent interview of Steven St. John by Petitioner's investigator revealed that St. John was given immunity and that the Assistant U.S. Attorney was very angry when he testified in the grand jury that he had never spoken to Frank Angotti about Strada's murder or anything else. The Steven St. John interviews, reports and grand jury testimony, which could have been used to discredit a key government witness, were never disclosed to Petitioner.

18. The government turned over the FBI interviews of Angotti shortly before trial. Angotti's grand jury testimony, threats against Angotti by the government agents and the agreement not to revoke Angotti's probation were never disclosed. At trial, Angotti testified

he had not been threatened by the government. Trial counsel was never provided a copy of Angotti's grant of immunity or advised that Angotti was on probation and had been threatened by the government with revocation if he failed to "cooperate" with the government. In an interview after trial, Angotti said he was granted immunity and that he had a "deal" with the government, and that was why he testified as he did.

19. On July 25, 2001, the District Court denied Petitioner's original motion on the merits and barred the Amended Claims in Petitioner's supplemental motion as untimely. Based on a certificate of appealability, Petitioner's appeal delineated all of the undisclosed exculpatory evidence that tended to show he was not guilty, that weakened the credibility of prosecution witnesses, and that demonstrated witnesses' bias, dishonestly, and motive to lie or exaggerate. Petitioner argued the materiality of this evidence. Petitioner argued that trial counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced Petitioner resulting in an unreliable or fundamentally unfair verdict.

20. Petitioner argued that the Amended Claims in his supplemental motion were made within one-year of the date on which the facts supporting them could have been discovered through the exercise of due diligence. Petitioner pointed out that all of this exculpatory evidence was still not available to him and it continues to be withheld by the government. Petitioner argued that this impediment (non-disclosure) had still not been removed and therefore the limitations period had not yet begun to run under 28 U.S.C. §2255(2). Petitioner argued in the alternative that the claims in his supplemental motion related back to the claims in his original motion and therefore his right to a hearing on the

merits should not be denied due to a procedural default. Petitioner also argued that his actual innocence should permit him a hearing on the merits.

21. While the appeal was pending, petitioner filed a Motion to Supplement the Record with exhibits showing that FBI Agent Daniel Craft had been caught falsifying reports in an unrelated case. The convictions in that case were vacated as a result of Craft's actions. Agent Craft was the agent that interviewed Earlywine and Dodds in this case. The court never ruled on the motion.

22. On May 16, 2003 the Court of Appeals issued its opinion and order. The Court of Appeals found "the supplemental motion is time-barred, unless Mandacina can satisfy a relation back analysis." (Appendix ("Pet. App.") A-31). The Court of Appeals disagreed with the District Court's conclusion that the amended Brady claim alleging the government failed to disclose the Borland Report did not relate back to the original Section 2255 motion. (Pet. App. A-33-34). However, the court rejected the argument that the government had a duty to disclose the list of names of the suspects Borland had identified as individuals with strong motives to murder the informant as well as all facts developed in the investigation of these suspects. The Court of Appeals observed that "evidence that a movant can discover through his own reasonable investigation is not illegally withheld by the government within the meaning of §2255(2), or under Brady," citing *United States v. Jones*, 160 F.3d 473, 479 (8th Cir. 1998). (Pet. App. A-35). In finding that nothing prevented trial counsel from conducting an expedited investigation of the Borland Report and, if necessary, requesting the trial be continued to allow for more investigation, the Court of Appeals effectively transmuted Petitioner's Brady

claims into ineffective assistance claims. The Court then summarily denied the ineffective assistance claims on procedural grounds due to the failure of the Petitioner to more specifically delineate them in his original §2255 motion. The panel never conducted an inquiry as to whether the remaining Amended Brady Claims[4] related back, stating they were discoverable by reasonable investigation. These claims were of the same time and type as the related Borland report claim wherein the Court of Appeals overruled the District Court in finding the Borland report claim related back to the original motion's allegation that the government failed to disclose exculpatory evidence, "including various physical and other evidence obtained by the Gladstone Police Department and detectives involved in the investigation of Mr. Strada's murder" and the allegation that:

> The Government failed to properly disclose . . . any and all information related by Mr. Strada prior to his death in which Mr. Strada implicated any other person in any criminal activity, including any organized crime-related activity. Such information constitutes favorable and exculpatory information in that it establishes a motive for others besides Movant Mandacina to have killed or conspired to kill Mr. Strada.... There is a strong factual basis to support a defense theory... that Mr. Strada was killed not [**10] because of any statements he may have made regarding Movant Mandacina, but instead was killed by others who had a much stron

[4] Disclosure of the investigation reports leading to the creation of the list of other suspects; the follow-up to the investigation of Borland's drug information; the Steven St. John reports, the immunity and grand jury testimony of Steven St. John and documents evidencing Angotti's probation and "deal" with the government.

ger motive to retaliate against Mr. Strada.

These Amended Claims also satisfied Rule 15(c) as the government had notice of these claims as the party responsible for creating them.

23. In denying the amended ineffective assistance claims under the relation back analysis, the Court of Appeals apparently relied upon the government's version of Petitioner's original claim and not the original §2255 motion. The order and opinion stated: "The original claim alleged a failure by counsel to *discover* allegedly exculpatory footprint evidence; whereas, the amended claim alleged a failure by counsel to *investigate* the Borland Report." (Pet. App. 36).

The original motion stated: "...trial counsel provided ineffective assistance by failing to properly pursue discovery of potential testimony and physical evidence obtained by the Gladstone Police Department, *including but not limited to* any evidence obtained by the Gladstone Police Department regarding the footprints..." (emphasis added). In Petitioner's Petition for Rehearing he argued that his Amended Claims effectively alleged a failure by counsel to discover exculpatory evidence stemming from the Borland Report, i.e., "*the potential testimony...obtained by the Gladstone Police Department.*" Petitioner argued that the panel misapplied *United States v. Craycraft*, 167 F.3d 451 (8th Cir. 1999) in recharacterizing movant's claims from his original motion in finding that the amended ineffective assistance claims did not relate back. Furthermore, Petitioner submitted that any lack of specifics in the original motion resulted from the conduct of the government in concealing its own non-disclosures. Petitioner argued this was the impediment to timely claims if the claims did not relate back. Petitioner also argued that the government's action prevented the earlier discov

ery of these claims even with due diligence.

The Court of Appeals denied as untimely the Petitioner's amended Brady and ineffective assistance claims regarding disclosure of Angotti's immunity and deals because Petitioner did not raise them in his original habeas motion. The Court of Appeals did not analyze under §§ 2255(2) or (4) these Brady and ineffective assistance claims. Nor did the Court discuss the effect of the government's continued non-disclosure in relation to the timeliness issue. The Court of Appeals summarily rejected Petitioner's arguments that his remaining supplemental claims, including the St. John evidence, were timely filed under §2255(2) and (4) or that the claims related back to the original motion, despite the government's non-disclosure of all of this evidence.

REASONS FOR GRANTING THE PETITION

This Court should grant a writ of certiorari because this case constitutes an erosion of this court's ruling in *Brady v. Maryland*; and the Court of Appeals failed to properly evaluate the shifting of the burdens contemplated by *United States v. Jones* under the correct constitutional standard, or misapprehended the controlling principles of the Due Process clause. This case represents a narrowing of the government's duty to disclose exculpatory evidence and raises substantial Due Process issues and represents a dangerous shifting of the burdens of proof.

Second, the Eighth Circuit decision conflicts with the reasoning of the cases of other circuits and of the Eighth Circuit itself. The opinion directly contradicts this Court's ruling in *Schlup v. Delo*, 513 U.S. 298 (1995).

Third, the issues presented herein constitute troublesome questions in the administration of justice, with

ongoing consequences. Discovery questions, and particularly Brady disclosures, are important to the administration of justice and are increasingly of such a recurring nature as to call for an exercise of this Court's supervisory power. This decision gives too much license to the government in it's non-disclosures of Brady type evidence.

I. The Court should grant certiorari because the government's concealment of exculpatory evidence renders Petitioner's conviction unconstitutional under the Due Process clause.

In *Brady v. Maryland*, 373 U.S. 83 (1963), this court held that the Due Process clause requires the government to disclose evidence favorable to the accused if the evidence is material to either guilt or punishment. The requirement of disclosure of favorable evidence, whether it is exculpatory evidence or related to impeachment evidence, applies whether the defendant made a request or not. *United States v. Bagley*, 473 U.S. 667, 674-678, 682 (1985). Post trial, Petitioner has shown the existence of substantial exculpatory evidence that was not disclosed by the government. The Court of Appeals affirmed the District Court's application of *United States v. Jones*, 160 F.3d 473 (8th Cir. 1999), which held: "evidence that a movant can discover through his own reasonable investigation is not illegally withheld by the government within the meaning of §2255(2) or under Brady." Id at 479. The Court of Appeals did not distinguish discovering the existence of exculpatory evidence from discovering the actual reports, interviews, grand jury transcripts or other documents.

Presumably, the District Court found that it was not unreasonable for trial counsel to locate and interview Donna Borland in the three weeks prior to trial. The court assumed trial counsel had the ability to locate

this witness, had sufficient time available to conduct a comprehensive interview, and assumed a willingness on the part of this witness to speak to trial counsel despite her apparent recalcitrance in her interview with the Metro Squad. Then, the court necessarily concluded that upon learning the names of the Borland "suspects", trial counsel would make additional discovery demands for the reports prior and subsequent to the Borland interview, under *Brady v. Maryland*, and then convince the identified individuals – including the suspected actual killer - to speak with him. Presumably, these subsequent interviews would have revealed the withholding of the secret grand jury testimony, under immunity, of Steven St. John who contradicted one of the government's key witnesses.

In the real world, it is submitted this evidence was not reasonably discoverable by trial counsel. Trial counsel still would not have obtained the reports in the sole possession and control of the government. The government should not be allowed to rely on trial counsel's failures to shield it's own *Brady* violation from judicial redress. See *Murray v. Carrier*, 477 U.S. 478, 488 (1986), citing *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980) (Sixth Amendment right to counsel means procedural default arising from ineffective assistance of trial counsel is imputed to sovereign rather than to accused citizen). It is unfair to disallow Petitioner's Amended Claims regarding wrongful government conduct on the premise that the government did not have adequate notice from the original pleading of the matters raised in the Amended Claims. The government made the decision to withhold the Brady evidence. This case presents the court with an opportunity to clarify or amplify the mechanism in place to rectify the situation wherein the government conceals it's own non-disclosures. Petitioner had no way to know what he didn't

know. This case also provides an opportunity to define what constitutes due diligence under 28 U.S.C. §2255(4) or a government impediment under 28 U.S.C. §2255(2).

Therefore Petitioner respectfully moves this Court to review to this critical area of criminal law.

II. The Court should grant certiorari because the opinion of the Court of Appeals conflicts with other circuits and with this Court's ruling in *Schlup v. Delo*, 513 U.S. 298 (1995).

In *United States v. Jones*, the court found that the undisclosed transcript of a witness' plea at sentencing hearing was readily available and therefore there was not a *Brady* violation if "the defendant(s) using reasonable diligence, could have obtained the information" themselves. *Jones* at 479. This case cited *Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir. 1996) cert denied, 519 U.S. 1094, 117 S.Ct. 773, 136 L.Ed 2d 717 (1997) and *United States v. Willis*, 997 F.2d 407, 412-13 (8th Cir. 1993); both cases involving readily available transcripts.[5] Here the reports pointing to other suspects, dealmaking with witnesses and grand jury testimony which directly contradicted a key government witness was known only to the government. Obtaining inter

[5] The District Court for the Northern District of Illinois has held that even readily available transcripts should not constitute an exception under the "reasonable investigation" rule if it was unreasonable to expect trial counsel to know they may contain exculpatory information. *United States v. Locke*, 1999 U.S. Dist.Lexis 11593 (ND.Ill. 1999). (Reversing due to the poor credibility of the government's witnesses and the overall weight of the evidence against the defendant, when trial counsel had no reason to suspect that statements in the transcript exculpated his client). Similarly, the Second Circuit rejected the government's argument that a failure to turn over an affidavit available in a public court file did not constitute suppression of evidence under Brady. *United States v. Payne*, 63 F.3d 1200, 1208-09 (2nd Cir. 1995).

views of suspects and other witnesses by law enforcement during a highly public investigation is difficult and this has been established by the inability to obtain them even years afterward.

The Fourth Circuit states the rule thusly: "the Brady rule does not apply if the evidence in question is available to the defendant from other sources." *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990). The Fifth Circuit takes it a step further stating "when evidence is available equally to the defense and the prosecution, the defendants must bear the responsibility for their failure to diligently seek their discovery." *United States v. Dula & Accrabond Corporation*, 989 F.2d 772, 776 (5th Cir. 1993) citing *United States v. McKenzie*, 768 F.2d 602, 608 (5th Cir. 1985), cert denied, 474 U.S. 1086, 88 L.Ed 2d 900, 106 S.Ct. 861 (1986). The Third Circuit stated:

> where a court has ruled that impeachment material falls more under Brady instead of, or in addition to, the Jencks Act, and orders it disclosed, the defendant has received a guarantee of protection. When the government refuses to comply with that order, it's non-compliance may totally deprive the defendant of a fair trial, or even the grounds for appellate review, if the material does not emerge from the secret government files. Under such circumstances, the defendant has been denied protection of the court and is placed entirely at the mercy of the United States Attorney, or more realistically of the assistant assigned to the case. Only if the defendant is the beneficiary of fortuitous happenstance by discovering the materials through extra judicial means, as was the case here, are his rights vindicated.

United States v. Starusko, 729 F.2d 256, 265 (3rd Cir.

1984). In the present case, the Petitioner was fortunate to discover the existence of undisclosed Brady material. A remedy would be available to the Petitioner in most circuits. This evidence was not discoverable through the exercise of reasonable investigation, or due diligence, since it was in the sole knowledge, possession and control of the government. The list of suspect names, the evidence supporting the Metro Squad's identification of these suspects, the corroborating evidence that these suspects had been indicted for drug charges, the interviews and grand jury testimony of Steven St. John which contradicted a government witness, and the coercion of Angotti were not disclosed to trial counsel. This information was not reasonably available and, certainly, was not equally available. Rather, the government was forced by the trial court to belatedly reveal the Borland Report, which only hinted at the plethora of exculpatory evidence that was not disclosed.

The ruling of the Court of Appeals directly conflicts with the ruling in *Edmond v. United States Attorney*, 959 F.Supp. 1 (D.D.C. 1997) wherein the court ruled:

> ...in accordance with the AEDPA (Anti-Terrorism Effective Death Penalty Act) the one-year period of limitation would not run until 'the date on which the impediment to making a motion created by governmental action and violation of the constitutional laws of the United States is removed.' 28 U.S.C. §2255(2). Therefore, if plaintiff is claiming that the government is holding exculpatory material (Footnote to *Brady v. Maryland*), the one-year limitation would not begin until the plaintiff receives that evidence.

Until the actual documents are all received, the Petitioner is not able to fully state any additional claims he

may have. The government's suppression was what prevented post-trial counsel from being more specific in the original motion. This court should find that 28 U.S.C. §2255(2) (following the logic in *Edmond*) prevents a procedural default due to the government's action. The government should be encouraged to favor disclosure of Brady evidence.[6]

The Eighth Circuit contradicted this Court's holdings when it found Petitioner did not meet the actual innocence standard. In order to conduct an actual innocence analysis, the District Court must review the withheld evidence: "...the focus on actual innocence means that a District Court is not bound by the admissibility rules that would govern at trial, but may consider the probative force of relevant evidence that was either wrongfully excluded or unavailable at trial." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). The Court of Appeals held the District Court found a failure to meet the actual innocence standard despite the fact that no hearing has ever been held and the District Court still had not benefited from a review of the undisclosed evidence to consider it's probative force. Furthermore, the District Court did not consider the statements of Charles St. John, which is the most clear and convincing evidence of Petitioner's innocence. Charles St. John admitted to having the ability, motive and opportunity to commit the crime, admitted to observing Strada set his weapon down on the trash bag seconds before the murder, and he admitted to committing the murder, in

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[6] Neither the prosecution nor the Court is aware of the defense strategy and therefore neither the prosecution nor the Court can accurately determine what may be important. *United States v. Sudikoff*, 36 F.Supp.2d 1196, 1202 (C.D. Cal. 1999). "where doubt exists as to the usefulness of evidence, (the government) shall resolve such doubts in favor of full disclosure. *United States v. Van Brandy*, 726 F.2d 548, 552 (9th Cir. 1984).

the presence of Kevin Cummings. An evidentiary hearing would establish that this evidence is consistent with the autopsy and other physical evidence and with Petitioner's theory that Strada was shot with his own weapon by someone he trusted. The suppressed evidence includes evidence that Borland believed that the St. Johns committed the murder, that Charles St. John believed that Strada had snitched on him, that Charles St. John knew Strada's routine, that St. John was facing a long prison term if Strada testified, and that Charles St. John's probation was eventually revoked because the government alleged he was stalking another "snitch" with a shotgun. No one knows what additional exculpatory evidence supporting actual innocence could be found in the undisclosed reports. If all of this evidence were properly reviewed, investigated, prepared, presented, and considered cumulatively by the District Court, as required by an actual innocence review, the court would not have confidence in the outcome unless the Court is also satisfied that the trial was free of non-harmless constitutional error. *Id* at 316. This is especially true in light of the fact that Petitioner's conviction relied entirely on the weak credibility of three witnesses looking to save their own skins.

Therefore, Petitioner respectfully prays that this Court grant certiorari to decide important questions of federal statutory and constitutional law and to resolve conflicts between the Courts of Appeal, and Petitioner's meritorious constitutional claims should pass through the actual innocence gateway to avoid a procedural default.

III. The Court should grant the petition in order to exercise its supervisory powers to correct an improper ruling by the lower court.

The prosecutor determined what was exculpatory

and what would be disclosed. The Metro Squad investigation reports, the secret reports, interviews and immunized grand jury testimony of Steven St. John and the deal with Angotti were in the exclusive control of the government. To hold they were reasonably available to counsel, who did not even know of their existence, and to convert the non-disclosure claims into ineffectiveness claims is unfair. This Court should employ its supervisory powers to correct a ruling that is unjust and unreasonable.

In determining whether the non-disclosed information was exculpatory, a court should consider whether the prosecution's failure to disclose the evidence misled the defense and thus adversely affected "the preparation or presentation of the defendant's case." *United States v. Bagley*, 473 U.S. 667, 682-683 (1985); *United States v. McKellar*, 798 F.2d 151, 153 (5th Cir. 1986). It should consider the totality of the circumstances of this case, with an awareness of the difficulty of determining what the defense would have done if the defense had not been misled by the government's failure to disclose the evidence. *Bagley*, 473 U.S. at 683; *Giglio v. United States*, 405 U.S. 150, 154-155 (1972); *East v. Johnson*, 123 F.3d 235 (5th Cir. 1997) (conviction reversed where prosecution suppressed evidence that would have led defense to discover report raising questions about state witness' reliability). The search for "materiality" requires a court to evaluate not only the potential power of the undisclosed evidence and its progeny, but also the relevant strength of prosecution's case. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). C.F. *United States v. Robinson*, 39 F.3d 1115, 1119 (10th Cir. 1994) ("what might be considered insignificant evidence in a strong case might suffice to disturb an already questionable verdict"). In this case, there was no physical evidence that linked Petitioner to the crime. Petitioner made no

incriminating statements or admissions and has always maintained his innocence. The government's case was based solely on the testimony of three witnesses who obtained immunity deals and had extensive criminal records. Had the government made the Brady disclosures, the defense could have presented the theory, corroborated by the physical evidence, that Charles and Steven St. John killed the informant for snitching on them and to prevent him from testifying against them in their pending drug case. This theory alone creates a reasonable probability that the result of the trial would have been different. Had the government disclosed the pressure it put on Frank Angotti and the contradictory evidence obtained under a grant of immunity from Steven St. John, there would again have been a reasonable probability that the result of the trial would have been different. Taken in it's entirety, the suppressed evidence and the evidence that could have been developed from it, created a substantial probability that the result would be different. The case that supported the conviction was weak. The government mislead the defense and the Court as to what evidence existed, causing trial counsel to abandon key lines of independent investigation, defenses and trial strategies that he otherwise would have pursued. Under *United States v. Bagley*, such factors should be weighed by the court examining the level of confidence in the outcome of trials over which they rely:

> The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense in the trial would have taken had the defense not been mislead by the prosecutor's incomplete response.

Bagley, 473 U.S. 683. While post trial counsel has determined that the exculpatory material exists, its continued non-disclosure trumps any argument that this evidence could have been discovered by reasonable investigation.

CONCLUSION

The resolution of the questions presented herein will have immediate importance far beyond the particular facts and parties involved in this case. Fundamental fairness demands government's compliance with Brady and its progeny. The prosecution can now conceal exculpatory evidence leading directly to other individuals with a greater motive, opportunity and ability to commit the crime for which a defendant is on trial, if it gives trial counsel a lead which may – or may not – permit him to discover this evidence, even if the lead is only given three weeks prior to trial. The dilemma this creates is only compounded if the Brady claims are converted to ineffective assistance of counsel claims with a resultant finding that trial counsel should have discovered that material through reasonable investigation. This shifts the focus from the government's wrongful conduct to trial counsel's competency and permits an end-run around of *Brady v. Maryland*. Of course, a declination to review, will reward the government's concealment of its non-disclosures. John Mandacina is innocent and was denied his constitutional right to a fair trial.

THEREFORE, for the tremendously important principles and compelling reasons contained herein, Petitioner prays this Court grant his petition for certiorari and permit him an opportunity to present his meritorious claims and/or grant Petitioner an evidentiary hearing after full disclosure to present his proof of actual innocence so his constitutional claims can avoid a procedural default.